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In Re: PETITION OF)	Civil No. MJG95-1270
MACCAFERRI GABIONS, INC.)	
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The United States Department of Justice ("the Department") respectfully submits this Memorandum in response to this Court's Memorandum and Order dated August 25, 1995.

Since issuing the CID on March 9, 1995, the Department has repeatedly expressed to Maccaferri its willingness to negotiate the scope of the CID. The Department has also repeatedly asked Maccaferri to provide it with certain basic information about its files and employees so that the Department could identify ways that the CID could be modified consistent with the Department's need for evidence and information. Maccaferri has repeatedly refused to provide the Department with that information, and has refused to engage in negotiations with the Department.

In response to the Court's Memorandum and Order, on August 31, the Department contacted Maccaferri's counsel to arrange a meeting to attempt to negotiate the CID. See Exhibit A. The Department again asked Maccaferri to provide it with certain information concerning Maccaferri's files. After first declining to meet with the staff conducting the investigation. Maccaferri agreed to meet with the Department on September 6. See Exhibits B, C, D, E and F.

At the September 6 meeting, Maccaferri again declined to provide the Department with information concerning its files, although it agreed to produce an organizational chart by Friday, September 8. The chart was never produced. Notwithstanding Maccaferri's uncooperative approach, the Department believed that it had reached agreement with Maccaferri concerning the scope of most of the interrogatories and document requests in the CID. As agreed at the meeting, the Department summarized the agreements in a letter, which it faxed to Maccaferri's counsel on the morning of September 7. Exhibit G. Maccaferri had agreed to respond to that letter no later than 10:00 am Friday, September 8.

When the Department had not heard from Maccaferri by 11:00 September 8, Ms. Moltenbrey made several calls to Maccaferri's counsel to discuss any differences that might exist. Mr. Klayman first stated that the differences were minor, and that he would respond to the Department's letter shortly. He then sent a letter to the Department stating that he would explain his understanding of the agreements in his filing with the Court. Exhibit H. Ms. Moltenbrey telephoned again to attempt to discuss any areas of disagreement with Maccaferri's counsel, who promised to respond shortly, but never did.

In sum, despite the Department's efforts to negotiate with Maccaferri in accordance with this Court's Order, Maccaferri has refused to negotiate in good faith. In this Memorandum the Department describes those interrogatories and document requests that, based on the September 6 meeting, it believes are still at issue.

BACKGROUND

In January 1995, the Department opened an investigation into potentially anticompetitive agreements and practices in the gabion, and gabion fastening tool industries. Specifically, the

Department sought to review possible anticompetitive practices by Maccaferri, by far the largest gabion manufacturer in the U.S., and Stanley Spenax ("Spenax"), the leading or only manufacturer of a functioning pneumatic gabion fastening tool.

Gabions are flexible, rectangular, compartmented containers fabricated from hexagonal mesh of galvanized steel wire that are filled with hand-sized stones. Individual gabions are connected to one another using wire lacing or metal fasteners, and are frequently used to control erosion. Maccaferri is one of six known gabion manufacturers in the United States, and one of two known twisted wire gabion manufacturers. Based on information it has gathered to date, the Department estimates that Maccaferri manufactures at least 70% of all gabions sold in the U.S.

Spenax manufactures C-rings, also known as hog rings, which are metal rings that are used to fasten gabions together. Spenax also manufactures the SC-50, a pneumatic tool used to close the C-rings around the gabions. The SC-50 allows contractors to assemble and fasten gabions much more quickly and efficiently than they could either by "lacing" or closing the C-rings by hand. Maccaferri and Spenax have entered into an exclusive dealing arrangement whereby Maccaferri is the only gabion manufacturer allowed to sell or purchase the Spenax SC-50, and Maccaferri purchases gabion fastening tools only from Spenax. As a result, Maccaferri's competitors have been unable to obtain the SC-50.

An exclusive dealing agreement will be found unlawful if it "will foreclose competition in a substantial share of the line of commerce affected." Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961). In Tampa Electric, the Supreme Court stated that the legality of an exclusive dealing agreement would depend on "the probable effect of the contract on the

relevant area of effective competition . . . and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." Id. at 329.

In this investigation the Department is seeking to determine, inter alia, whether the exclusive dealing agreement between Maccaferri and Spenax has either of two potential anticompetitive effects. First, the Department is investigating whether, by depriving other gabion manufacturers of access to the SC-50, the agreement will prevent those manufacturers from competing in the sale of gabions, and as a result consumers, including local, State, and the Federal governments, may pay more for gabion projects. In addition, the Department is investigating whether by preventing potential competing manufacturers of gabion fastening tools from selling to Maccaferri, the exclusive dealing agreement is restricting competition in the manufacture and sale of gabion fastening tools.

To determine whether the exclusive dealing agreement has either of these two effects, the Department must determine, among other things, whether gabions are a product market, or whether, as Maccaferri contends, they compete with other erosion control devices, whether lack of access to the SC-50 in fact limits the ability of other gabion manufacturers to compete for gabion projects, and whether it is likely that competing gabions manufacturers or other entrants would develop a competing tool to the SC-50. The Department is also investigating whether there is any efficiency justification for an exclusive dealing agreement between Maccaferri and Spenax. Accordingly, on March 9, 1995, the Department issued a CID pursuant to the Antitrust Civil Process Act, 15 U.S.C. § 1312, directing Maccaferri to produce documents and interrogatory answers by March 29, 1995. This CID was reviewed and revised by several attorneys at the Department at both the staff and supervisory levels before being presented to the

Assistant Attorney General for her review and signature. The attorneys at all levels carefully considered the scope of the CID to ensure that it was not overbroad or unduly burdensome.

UNRESOLVED ISSUES

I. Interrogatories Number 18 and 19

Interrogatory Number 18 asks for information regarding each bid that Maccaferri submitted to supply gabions since January 1, 1991, or was submitted by any other person on Maccaferri's behalf. Interrogatory Number 19 asks for information regarding the last five bids in which Maccaferri was successful. These interrogatories seek evidence relating to market structure and the state of competition in the gabion market. The Department typically seeks and obtains this type of bid information in connection with its investigations in order to identify customers, evaluate cost and pricing information, determine the types of projects that a company bids on, and determine the extent to which it faces competition for any projects. Bid documents may also be used by an economist or financial analyst in preparing expert testimony.

Maccaferri has objected to these interrogatories, stating that they are irrelevant and that they require the compilation of 7,500 to 10,000 bids per year, which would require four to five employees to work with 11 area managers for at least one year. Maccaferri has suggested that it would be willing to supply a sample of 20 bids of its choosing.

The Department has already agreed that Maccaferri may submit bid files containing the requested information in lieu of a written response. The Department also has been willing to consider ways to limit the scope of any search that needs to be done. For example, it might be sufficient to limit the search to bid files located in Maccaferri's headquarters, or in a subset of regional offices. However, Maccaferri has refused to supply the Department with information

concerning where and how its bid records are maintained. The Department is not willing to accept Maccaferri's offer of 20 bids, because this would not constitute a representative sampling from which any sound conclusion could be drawn.

Because Maccaferri has refused to cooperate with the Department in its attempt to identify ways to narrow this request, the Department requests that Maccaferri be required to respond to these requests as written.

II. Document Request Number 2

This request seeks minutes, agendas, and notes relating to each meeting of Maccaferri's board of directors, and for each such meeting, all documents distributed or exhibited at the meeting. The Department typically relies on such documents to assess issues such as product and geographic market, the likelihood of entry, and the effect of exclusive dealing agreements on competition. These documents also may produce evidence concerning Maccaferri's marketing and business strategy for the sale of gabions, and its reasons for entering into an exclusive dealing arrangement with Spenax.

At the September 6 meeting the Department offered to limit this request to responsive documents relating to the Spenax SC-50, hog rings, and gabions. Maccaferri objected to the requirement that it produce responsive documents relating to gabions. Given the importance to the Department's investigation of competition among gabion manufacturers, the Department is not prepared to accept Maccaferri's proposal limiting this interrogatory to documents relating to the SC-50 and hog rings. The Department remains willing to limit the interrogatory to responsive documents that relate to gabions, hog rings or the SC-50.

III. Document Request Number 5

This request asks for documents since January 1, 1991 relating to any attempt, by Maccaferri or another person, to acquire or manufacture a substitute tool for the Spenax SC-50 pneumatic fastening tool. This document request seeks evidence relevant to entry barriers into the manufacture of pneumatic fastening tools. The ease with which Maccaferri's competitors could acquire a substitute tool likely would be a central issue in any case that might arise from this investigation. Documents that discuss the ability of Maccaferri or other to obtain a substitute tool are extremely relevant, especially given Maccaferri's contention that the Spenax SC-50 can be easily copied at low cost. Maccaferri has failed to explain the basis for its objection. Accordingly, Maccaferri should be required to respond to this request as written.

IV. Document Request Number 11

This request seeks documents since January 1, 1991 that constitute or contain Maccaferri's business, operating or marketing plans, or strategic and long-range plans. It is intended to obtain evidence relating Maccaferri's marketing and business strategy for the sale of gabions and the effect of its exclusive dealing arrangement with Spenax. These types of documents are frequently used as evidence in civil antitrust proceedings. Accordingly, Maccaferri should be required to respond to this request as written.

V. Document Request Number 13

This request asks for Maccaferri's balance sheets and income statements since January 1, 1993. It seeks evidence concerning Maccaferri's income and profitability. Such information is frequently relevant to various defenses raised in antitrust cases, and may be relied upon by economic or financial analysts preparing expert testimony. Maccaferri has not raised any

specific objection to this request, and indeed, failed to mention its objection before the September 6, 1995 meeting. Accordingly, Maccaferri should respond to this request as written.

VI. Document Request Number 16

This request asks for documents relating to Maccaferri's market share in the gabion market. Such documents frequently provide evidence relating to market definition, market power, and might also provide evidence on the effect of the exclusive dealing agreement on Maccaferri's market share. Again, Maccaferri has failed to explain the basis for its objection to this request, and first raised its objection at the September 6, 1995 meeting.

Maccaferri should be required to respond to this request as written.

CONCLUSION

Throughout this investigation, the Department has repeatedly made efforts to work with Maccaferri to resolve issues raised by the CID. Maccaferri has consistently refused to negotiate over the CID. Indeed, Maccaferri's response to this Court's Memorandum Order is consistent with the evasive and obstructionist approach it has taken with respect to this entire investigation.

By refusing to engage in constructive negotiations with the Department, Maccaferri is seeking to further delay its compliance with the CID and thus the investigation. The Department believes that the Court should not reward this behavior by allowing Maccaferri to raise issues beyond those described in the Department's September 7, 1995 letter. The Department respectfully requests that this Court order Maccaferri to comply with the CID, as modified in the attached proposed Order, within 20 days.

Respectfully submitted,

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Antitrust Division

/S/

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Dated: September 8, 1995

CERTIFICATE OF SERVICE

I certify that I have served, by hand delivery, a copy of the foregoing United States'
Memorandum, on counsel of record for Maccaferri Gabions, Inc., at the address below on September 8,
1995:

Larry Klayman
Klayman & Associates, P.C.
501 School Street, S.W. - Suite 700
Washington, D.C. 20024

/S/ _____
Jeffrey Steger

In Re: PETITION OF
MACCAFERRI GABIONS, INC.

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Upon review of Maccaferri Gabion Inc.'s Memorandum submitted pursuant to this Court's Memorandum and Order dated August 25, 1995, the United States' Memorandum, and the entire record in this case, it is

1. Interrogatory Number 2 is modified to exclude current and former employees whose only responsibilities are manufacturing, production, or clerical. Subject to further modification by agreement of the parties, Maccaferri will identify all other current and former employees from January 1, 1993 to the present.
2. Interrogatory Number 3(i) is modified to require Maccaferri to provide a general description of its methods of sales and distribution and the employees responsible for these functions. Interrogatory Number 3(ii) is modified to require that Maccaferri produce a list of its distributors or other documents that would contain that information.
3. Document Request Number 2 is modified to require Maccaferri to provide responsive documents relating to the Spenax SC-50, hog rings, and gabions.
4. Document Request Number 6 is modified to require Maccaferri to produce all documents referring to Stanley Spenax or the Tiger-Tite tool as it relates to competition with Terra Aqua.
5. Document Request Number 8 is deleted.
6. Document Request Number 11 is modified to require Maccaferri to produce all documents relating to the Spenax SC-50 or gabions dated after January 1, 1993.

7. With respect to all other interrogatories and document requests not previously complied with, Maccaferri will respond to the requests as written; and it is

FURTHER ORDERED that Maccaferri comply with Civil Investigative Demand 12316 as modified by this Court, and within 20 days from the date this Order is entered produce the documentary material and interrogatory answers required by the terms of the Civil Investigative Demand and its attached schedule as amended.

Dated: _____

United States District Court Judge

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UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

In Re: PETITION OF

MACCAFERRI GABIONS, INC.

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Civil No. MJG95-1270

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